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No. 95-266

In the Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, PETITIONER

v.

MARYLU REDMOND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

DREW S. DAYS, III
Solicitor General
PAUL BENDER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether confidential communications made by a patient to a psychotherapist in the course of and for the purposes of psychotherapeutic treatment are privileged under Rule 501 of the Federal Rules of Evidence.

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INTEREST OF THE UNITED STATES

This case presents the question whether the federal courts should recognize a privilege under Rule 501 of the Federal Rules of Evidence for confidential communications between a clinical social worker and a patient made in the course of psychotherapeutic treatment. As a frequent litigant in federal courts, the federal government has an interest in the reliability of the judicial fact-finding process, and thus in the broad availability of relevant evidence in civil and criminal cases.

The federal government also has an interest in the availability and effectiveness of psychotherapeutic treatment, especially when a federal employee is involved in a stressful incident arising out of or in the course of employment. Agents of the various federal law enforcement agencies, for example, are often involved in traumatic incidents like that in this case. Federal law enforcement agencies encourage—or, in some cases, require—agents involved in such incidents to obtain psychotherapeutic treatment and counseling. Such incidents may result in litigation. If statements made during psychotherapeutic treatment are not privileged, the prospect of such litigation may affect the agents' willingness to obtain therapy.

FEDERAL RULE INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privileges of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT

1. Respondent Redmond, a police officer of respondent Village of Hoffman Estates, Illinois (Village), responded to a reported fight in progress at an apartment complex. She was informed that there had been a stabbing. Shortly after arriving on the scene, she shot and killed Ricky Allen, Sr. She testified that, at the time of the shooting, Allen was pursuing and gaining on another man, whom he was poised to stab with a butcher knife. Four of Allen's brothers and sisters testified that he was unarmed at the time of the shooting. A butcher knife was found at the scene, although witnesses for petitioner testified that the butcher knife did not appear until after Allen's body was removed. Pet. App. 2-5.

After the shooting, Redmond sought counseling from Karen Beyer, a licensed clinical social worker certified by Illinois as an employee assistance counselor and employed by the Village. Redmond met with Beyer two to three times each week for at least six months, beginning a few days after the shooting. Pet. App. 5-6.

2. Petitioner, on behalf of Allen's estate, commenced this action against Redmond and the Village in the United States District Court for the Northern District of Illinois. Petitioner claimed that Redmond had deprived Allen of his civil rights under 42 U.S.C. 1983 because her use of deadly force violated the Fourth Amendment, and that Redmond was also liable under a state wrongful death statute for having caused Allen's death. J.A. 8-12.

When Redmond was deposed, petitioner asked her questions concerning the substance of her communications with Beyer. Redmond asserted privilege and refused to respond. Petitioner subsequently subpoenaed Beyer to testify at a deposition. Pet. App. 6. The district court refused to quash the subpoena, based on the court's belief

that any psychotherapist-patient privilege that would be applicable would extend only to psychiatrists and psychologists and would not extend to Beyer, who was a social worker. Pet. App. 7 & n.5. Throughout discovery and at trial, Beyer and Redmond continued to attempt to protect the confidentiality of communications between them, see Pet. App. 8-9, though Beyer ultimately gave limited testimony concerning Redmond's "factual description of the events leading up to the shooting." Pet. App. 9; see J.A. 112-122. Beyer also testified about the timing, duration, and number of her meetings with Redmond. J.A. 112-113. Aside from three redacted pages, Beyer never produced her notes and never testified concerning Redmond's disclosures concerning her thoughts and intentions. Pet. App. 8. Redmond testified about the timing, duration, and number of her meetings with Beyer, J.A. 100-101. In response to questions regarding what she had told Beyer, she consistently responded, "I can't recall." J.A. 102-107.

The trial court instructed the jury that there was no legal justification for Beyer to refuse to turn over her notes, and that the jury was therefore "entitled to presume that the contents of the notes would be unfavorable to [respondents]." Pet. App. 9 & n.9. The jury returned a verdict in favor of petitioner for $45,000 for the Section 1983 claim and $500,000 for the state wrongful death claim. Pet. App. 11.

3. Respondents raised two issues on appeal. First, they argued that the instructions concerning deadly force were incorrect. The court of appeals rejected that argument (Pet. App. 12-14), and it is no longer of relevance in this case.

Respondents also argued that the district court's instructions incorrectly informed the jury that there was no privilege applicable, and that the instructions improperly stated that the jury could draw an adverse inference from respondents' failure to disclose information regarding Redmond's disclosures to Beyer during psychotherapy. The court of appeals held that there was a psychotherapist-patient privilege and that it was applicable to Beyer as a licensed clinical social worker. Accordingly, the court reversed the judgment and remanded for a new trial. Pet. App. 15-23.

The court of appeals noted that, under Fed. R. Evid. 501, "the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The court stated that in its view the need for a psychotherapist-patient privilege had increased in recent years, because of increasing crime and violence that puts stress on witnesses, bystanders, and police officers. Pet. App. 17-18. The court also stated that "[r]eason tells us that psychotherapists and patients share a unique relationship, in which the patient's ability to communicate freely without the fear of public disclosure is the key to successful treatment." Pet. App. 18. The court noted that "communications with a psychotherapist often involve highly personal matters, the disclosure of which would frequently be embarrassing to the point of mortification for the patient." Pet. App. 19 (internal quotation marks omitted). Finally, the court noted that "all fifty states have recognized the need for and have adopted varying forms of the psychotherapist-patient privilege." Pet. App. 20. Based on those facts, the court found that recognition of a privilege under Rule 501 was warranted.

With respect to the scope of the privilege, the court held that it "will determine the appropriate scope of the privilege by balancing the interests protected by shielding the evidence sought with those advanced by disclosure." Pet. App. 22 (internal quotation marks omitted). The

court "decline[d] to speculate as to what situations would call for the abrogation of this privilege," finding that in "a factual situation [like this case] * * * the balance of the competing interests tips sharply in favor of the privilege if we hope to encourage law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help." *Ibid.*

Finally, the court held that the scope of the privilege should include not only psychiatrists and psychologists, but "other mental health care providers as well, including licensed clinical social workers." Pet. App. 22 n.19 (italics omitted). Noting that "social workers have been characterized as the 'poor person's psychiatrist,'" the court found that distinguishing practitioners like petitioner Redmond's psychotherapist, who was fully licensed under state law, from professionals with other job titles "serves no discernible public purpose." Pet. App. 23 n.19.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 501 instructs courts that the claim of privilege of a witness "shall be governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience." As the decisions of this Court and the legislative history of the Rule confirm, that language does not "freeze" the law of privileges as of a particular date or disable the federal courts from recognizing a privilege that was not historically accepted at common law. Since recognition of a privilege potentially results in the unavailability of relevant and probative evidence, however, the proponent of the privilege must shoulder a heavy burden of showing that the social benefits of recognizing the privilege outweigh the potential injury to the judicial fact-finding function.

Recognition of a psychotherapist-patient privilege is justified under that standard. The difficult task of weighing the costs and benefits of the privilege is eased in this case by the unanimous judgment of the States that some form of psychotherapist-patient privilege is justified. The States would be unlikely to have reached that judgment if doing so would have imposed an unduly high cost on their judicial systems or failed to promise substantial social benefits. The judgment of the States that the privilege is justified provides a useful measure of the "reason and experience" in the light of which Rule 501 must be applied.

The judgment of the States is confirmed by an analysis of the costs and benefits of recognizing this privilege. Most confidential communications in the psychotherapeutic setting are unlikely to have any relevance in litigation. The test of the privilege comes when, as in this case, an incident produces both litigation and emotional and mental stress on the participants. In such cases, the absence of a privilege may lead the individuals involved to refuse psychotherapeutic treatment or to be unduly guarded in their statements during such treatment. Thus, failing to recognize the privilege would not often lead to the availability of significant new evidence, but would impose a difficult choice on those who need psychotherapeutic treatment. The burden would be particularly heavy on law enforcement officers, who are likely to suffer the emotional after-effects of traumatic incidents and who are also subject to being named as defendants in litigation resulting from such incidents.

None of the accepted exceptions or limitations to the privilege would appear to apply to the facts of this case. As the court of appeals noted, Officer Redmond was careful to preserve the privilege and did not divulge the contents of her communications to her psychotherapist throughout

discovery and trial proceedings. Petitioner argues that the fact that Officer Redmond's psychotherapist was a clinical social worker—rather than a psychiatrist or psychologist—is fatal to the claim of privilege. The basis of the privilege is society's interest in the availability and benefits of psychotherapeutic treatment, however, not the particular school of treatment or discipline in which the therapist is licensed or otherwise qualified. Where, as here, state law recognizes clinical social workers as appropriate providers of psychotherapy and grants them a privilege commensurate with that of psychologists or psychiatrists, those who receive care from a clinical social worker in that State have a reasonable expectation that their communications will be confidential. Accordingly, the psychotherapist-patient privilege should apply.

ARGUMENT

CONFIDENTIAL COMMUNICATIONS MADE BY A PATIENT TO A PSYCHOTHERAPIST IN THE COURSE OF AND IN FURTHERANCE OF PSYCHOTHERAPEUTIC TREATMENT ARE PRIVILEGED UNDER FEDERAL RULE OF EVIDENCE 501

A. Under Rule 501, The Federal Courts Have The Authority To Recognize A Privilege Not Historically Recognized By The Common Law

Under Rule 501 of the Federal Rules of Evidence, "the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The general nature of the inquiry required by the Rule is reasonably clear: The historical common law privileges are generally to be recognized by the federal courts, although they should be re-examined where the rationale supporting them has become questionable. With

respect to privileges not accorded historical recognition under the common law, Rule 501 grants federal courts authority to accord them recognition if they satisfy the requirements of that Rule.

1. The federal courts are deeply committed to the principle that "the public * * * has a right to every man's evidence." *United States* v. *Bryan*, 339 U.S. 323, 331 (1950). Exceptions to broad principles of admissibility of relevant evidence "are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Privileges are therefore "not lightly created nor expansively construed." *Ibid.* A privilege may be "accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel* v. *United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

Where an accepted common law privilege, such as the attorney-client,[1] marital,[2] or priest-penitent privilege,[3] is involved, a federal court need not re-examine in each case whether the privilege is generally justified. Even with respect to such privileges, however, Rule 501 does not "freeze" the law of privilege. As demonstrated by this

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[1] See, *e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law"); *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888).

[2] See, *e.g.*, *Pereira* v. *United States*, 347 U.S. 1, 6-7 (1954); *Blau* v. *United States*, 340 U.S. 332, 333-334 (1951); *Wolfle* v. *United States*, 291 U.S. 7, 13-16 (1934); *Stein* v. *Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839).

[3] See, *e.g.*, *Trammel*, 445 U.S. at 53 (dictum); *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990); *Mullen* v. *United States*, 263 F.2d 275, 280 (D.C. Cir. 1958).

Court's decision in *Trammel* limiting the privilege for adverse spousal testimony, there are cases in which "reason and experience" require re-examination of the scope or incidents of even an historically excepted common law privilege.

Just as Rule 501 may on occasion require a re-evaluation of an historical common law privilege, so the Rule also may require recognition of a privilege not historically accepted by the common law. As this Court observed in *Trammel*, the language of Rule 501 "acknowledge[s] the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials," and "manifest[s] an affirmative intention not to freeze the law of privilege." 445 U.S. at 47.

2. The history of the Federal Rules of Evidence confirms that Rule 501 was not intended to preclude recognition of a privilege not historically recognized at common law. As originally formulated by the Advisory Committee and transmitted to Congress by this Court, the Federal Rules of Evidence provided that federal courts would recognize nine specific privileges (including a psychotherapist-patient privilege, see *Rules of Evidence for United States Courts and Magistrates* (*Proposed Rules*), 56 F.R.D. 183, 240-241 (1972) (Proposed Rule 504), plus whatever others were "required by the Constitution * * * or provided by Act of Congress." Proposed Rule 501, 56 F.R.D. at 230. Congress rejected that codification of the law of privilege, instead enacting Rule 501 as it currently stands. Congress did not, however, thereby intend to disapprove or foreclose the recognition of the specific privileges included in the proposed rules.

Congress's substitution of Rule 501 for the proposal transmitted by this Court was necessary, not because the proposed rules were too broad, but because they were too

controversial for Congress to evaluate without unduly delaying the entire Rules project. As the Senate Committee stated, "it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and * * * the inability to agree threatened to forestall or prevent passage of an entire rules package." S. Rep. No. 1277, 93d Cong., 2d Sess. 6 (1974). See also 120 Cong. Rec. 40,891 (1974) (stating that "the privilege section of the rules of evidence generated more comment or controversy than any other section"). To permit prompt enactment of the Federal Rules of Evidence, Congress therefore decided to "leav[e] the law in its current condition," while expressly stating that the law should be " developed" by the federal courts using "the principles"—but not necessarily the precise privileges—"of the common law." S. Rep. No. 1277, *supra*, at 6 (emphasis added).

Far from expressing an intent to freeze the common law of privilege, the Committee specifically expressed its agreement with the principle that privileges not historically recognized at common law could be recognized where they satisfied "the principles of the common law as * * * interpreted * * * in the light of reason and experience." Indeed, referring specifically to the psychotherapist-patient privilege, the Committee explained:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 [regarding the psychotherapist privilege] of the rule submitted by the Supreme Court. *It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme*

> *Court rules.* Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. No. 1277, *supra*, at 13 (emphasis added). See also 120 Cong. Rec. 40,891 (1974) ("Rule 501 is not intended to freeze the law of privilege as it now exists.").

3. As this Court stated in *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990), "although Rule 501 manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis," that flexible authority should not be exercised "expansively." *Id.* at 189 (internal quotation marks omitted); see also *Herbert* v. *Lando*, 441 U.S. 153, 176 (1979) (evidentiary privileges "disfavored"). Instead, a court called upon to recognize a privilege that was not historically recognized at common law may not recognize the claimed privilege unless its proponent can demonstrate that it satisfies the principles that have controlled the common law development of privilege, as interpreted in the light of "reason" and of the "experience" that can be gleaned from modern social and legal developments.

B. A Psychotherapist-Patient Privilege Deserves Recognition Under The Principles By Which The Common Law Has Historically Recognized Privileges

An assertion under Rule 501 of a privilege for confidential communications not historically recognized at common law can be guided by two inquiries. First, unanimous or near-unanimous recognition of a privilege by state law supports recognition of the privilege under Rule 501, especially where the States have the primary

interest in regulating the relationship in which the confidential communications take place. Second, a privilege should not be recognized under Rule 501 unless the proponent of the privilege demonstrates that the benefits of the privilege outweigh its costs to the factfinding process. The results of both inquiries suggest that a psychotherapist-patient privilege should be recognized.

1. *State Law.* Where a privilege is claimed for confidential communications that take place within a relationship that is primarily governed by state law, the degree of recognition of that privilege by the States provides a useful point of departure for the analysis. For example, in *Trammel*, the Court reversed its historical understanding of the privilege for adverse spousal testimony, holding that a defendant may not preclude a willing spouse from testifying against the defendant at a criminal trial. After stating the general principles governing the analysis, the first factor the Court turned to was that "support for the privilege against adverse spousal testimony has been eroded," citing the fact that the number of States recognizing the privilege had declined over the years. 445 U.S. at 48 (citing state statutes). See also *United States* v. *Zolin*, 491 U.S. 554, 569-570 (1989) (referring to trends in state law in deciding issue under Rule 501); *United States* v. *Gillock*, 445 U.S. 360, 368 (1980) (recognizing importance of state law in this area); *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992); cf. *Branzburg* v. *Hayes*, 408 U.S. 665, 686, 689 (1972) (pre-Rule 501 case concerning claim of First Amendment reporter's privilege). The experience of the States can be important under Rule 501 for a number of reasons.

One element of the analysis under Rule 501 requires inquiry into the cost imposed by the privilege on the "normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel* v. *United States*,

445 U.S. at 50. States can generally be expected zealously to protect the fact-finding function of their courts. Accordingly, if the States have unanimously or overwhelmingly recognized a privilege, it suggests that such recognition does not unduly impair the judicial fact-finding function. With respect to the potential injury to the fact-finding process, the States' recognition of a privilege provides a useful measure of the "experience" that federal courts must consult in interpreting the "principles of the common law" under Rule 501.

State law is also of relevance in assessing the public interest that would be served by recognizing the privilege. The rationale for recognizing a privilege for confidential communications is not ordinarily to improve the functioning of the litigation process, but rather to achieve a non-litigation goal by supporting a confidential relationship in which society has a strong interest. Cf. *Trammel*, 445 U.S. at 51 (discussing rationales for several privileges); *United States* v. *Nixon*, 418 U.S. 683, 705 (1974) (executive privilege); *Wolfle* v. *United States*, 291 U.S. 7, 14 (1934) (marital privilege); *Stein* v. *Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839) (same). Where the States have primary regulatory authority over the relationship in question and have generally concluded that a privilege arising out of that relationship will achieve a social good, that judgment is entitled to respect. Conversely, if federal courts refuse to recognize a privilege so widely recognized by the States, the public interest sought to be furthered by the States—not the litigation interests of the federal courts—would be threatened. In short, the States' judgments in this area deserve careful attention.[4]

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[4] Even though Congress ultimately rejected the proposed Federal Rules regarding privilege, those proposed rules provide a useful guide to the law of privilege as of the time of their proposal. The omission of a privilege from the proposed rules, standing alone, does not compel the conclusion that it should not be recognized. But such an omission "does suggest that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." *United States* v. *Gillock*, 445 U.S. 360, 368 (1980). See also *United States* v. *McPartlin*, 595 F.2d 1321, 1336-1337 (7th Cir.), cert. denied, 444 U.S. 833 (1979); *In re Grand Jury Proceedings*, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), aff'd, 570 F.2d 562 (6th Cir. 1978). The fact that the proposed rules included a psychotherapist-patient privilege, on the other hand, supports the conclusion that such a privilege was not inconsistent with the "principles of the common law."

In this case, state law cuts decisively in favor of recognition of a privilege. As the court of appeals noted, all 50 States and the District of Columbia have adopted some form of psychotherapist-patient privilege. Pet. App. 20 & n.17. See also Pet. Br. 31 ("every state and the District of Columbia appear to have adopted some protection for confidential communications with a psychiatrist or a clinical psychologist").

Petitioner contends that the experience of the States in this area is less compelling than it might seem because state laws vary with respect to the nature of protection the privilege accords and the exceptions that are recognized. Pet. 31-38. No non-constitutional privilege is without exceptions or qualifications, and the details of the laws of 50 States and the District of Columbia exhibit substantial variance. There is nonetheless substantial uniformity among the States concerning the general contours of the exceptions applicable to the psychotherapist-patient privilege.

One class of standard exceptions is based on the need for the testimony of psychotherapists where such testimony must substitute for the testimony of the patient or others who may be unable to protect their own rights. Thus, the

States almost universally provide exceptions for cases involving abuse of children, incompetents, or disabled persons, and for proceedings involving hospitalization of the patient.[5] Another standard exception is essentially a codification of waiver principles; it prohibits assertion of

[5] See, *e.g.*, Alaska Rules of Court, Rules of Evid. 504(d)(4) (1995) (hospitalization); Conn. Gen. Stat. § 52-146c(c)(4) (Supp. 1995) (child abuse, elderly abuse, abuse of disabled or incompetent); Cal. Evid. Code § 1027 (West 1995) (child victim of crime); Del. Code Ann., Unif. R. Evid. 503(d)(3) and (4) (1991) (hospitalization, child abuse); Fla. Stat. Ann. § 90.503(4)(a) (West 1979) (hospitalization); Haw. Rev. Stat. ch. 33, § 626, Rule 504.1(d)(1) (1988) (hospitalization); Idaho Rules of Evid. 503(d)(1) and (4) (1995) (child abuse, hospitalization); Ill. Ann. Stat. ch. 740, para. 110/11(i) (1993) (child abuse); Ky. St. Rev., Ky. Rules of Evid. 507(c)(1) (1994) (hospitalization); La. Stat. Ann., La. Code of Evidence Rule 510(B)(2)(e) and 510(C)(2)(f) (1995) (child abuse, elder abuse, or abuse of disabled person); Me. Rev. Stat. Ann. tit. 22, § 4015 (1992) (child abuse); Me. Rules of Evid. 503(e)(1) (West 1995) (hospitalization); Md. Cts. & Jud. Proc. § 9-109(d)(1) (1995) (hospitalization); Mass. Gen. L. ch. 112, § 129A(1) (1991) (hospitalization); Mich. Comp. Laws Ann. § 330.1750(3)(b) (West 1992) (hospitalization); Minn. Stat. § 595.02, subd. 2 (1988) (abuse or neglect of minor); Neb. Rev. Stat. § 27-504(4)(a) and (d) (Supp. 1994) (hospitalization, injuries to children, incompetents, or disabled persons); Nev. Stat. ch. 640, § 1995 (hospitalization, child abuse or neglect); N.M. Stat. Ann., Rules of Evid., Rule 11-504(D)(1) (1994) (hospitalization); N.C. Gen. Stat. § 8-53.3 (Supp. 1994) (abuse or neglect of child or disabled adult); N.D. Court Rules Ann., Rule of Evid. 503(d)(1) (1994) (hospitalization); Okla Stat. tit. 12, § 2503(D)(1) (1992) (hospitalization); R.I. Gen. Laws § 5-37.3-4(4) (Supp. 1994) (child abuse); S.D. Codified Laws Ann. § 19-13-9 (1995) (hospitalization) and § 26-8A-15 (1992) (child abuse or neglect); Tenn. Code Ann. § 37-1-411 (1991) (child abuse); Utah Court Rules Ann., Rules of Evid. 506(d)(2) (1995) (hospitalization); Vt. Stat. Ann. Rules of Evid. 503(d)(1), (5), and (7) (1983 & Supp. 1995) (hospitalization, child abuse); Va. Code Ann. § 8.01-400.2 (Michie 1992) (child abuse); Wis. Stat. § 905.04(4)(a) and (e) (1993 & Supp. 1995) (hospitalization, child abuse); Wyo. Stat. § 33-27-123(a)(i) and (v) (Supp. 1995) (abuse or neglect of children, the elderly, or the disabled).

the privilege where the patient's mental condition or the psychotherapeutic relationship is an element of the patient's claim or defense.[6] Other exceptions are based on the absence of a genuine psychotherapist-patient relationship, such as the common exception for court-ordered examinations.[7] Finally, many States recognize an excep-

[6] See, *e.g.*, Alaska Rules of Court, Rules of Evid. 504(d)(1) (1995); Cal. Evid. Code § 1016 (West 1995); Colo. Rev. Stat. Ann. § 13-90-107(3) (Supp. 1995); Conn. Gen. Stat. § 52-146c(c)(2) (Supp. 1995); Del. Code Ann., Unif. R. Evid. 503(d)(3) (1991); Fla. Stat. Ann. § 90.503(4)(c) (West 1979); Haw. Rev. Stat. ch. 33, § 626, Rule 504.1(d)(3) (1988); Idaho Rules of Evid. 503(d)(3) (1995); Ill. Ann. Stat. ch. 740, para. 110/10(a)(1) (1993); Iowa Code § 622.10 (Supp. 1995); Ky. St. Rev., Ky. Rules of Evid. 507(c)(3) (1994); La. Stat. Ann., La. Code of Evidence Rule 510(B)(2)(c) (1995); Me. Rules of Evid. 503(e)(3) (West 1995); Md. Cts. & Jud. Proc. § 9-109(d)(3)(i) (1995); Mass. Gen. L. ch. 233, § 20B(c) (Supp. 1995); Mich. Comp. Laws Ann. § 330.1750(3)(a) (West 1992); Neb. Rev. Stat. § 27-504(4)(c) (Supp. 1994); 1995 Nev. Stat. Ch. 640, § 19; N.M. Stat. Ann., Rules of Evid., Rule 11-504(D)(3) (1994); N.D. Court Rules Ann., Rule of Evid. 503(d)(3) (1994); Ohio Rev. Code Ann. § 4732.19 (1994) and § 2317.02(B)(1)(a)(iii) (1995); Okla Stat. tit. 12, § 2503(D)(3) (1993); Or. Rev. Stat. § 40.230 Rule 504(4)(b)(B) (1993); S.D. Codified Laws Ann. § 19-13-11 (1995); Tex. R. Civ. Ev. r. 510(d)(5) (West 1995); Utah Court Rules Ann., Rules of Evid. 506(d)(1) (1995); Vt. Stat. Ann. Rules of Evid. 503(d)(3) (1983); Wis. Stat. § 905.04(4)(c) (1993); Wyo. Stat. § 33-27-123(a)(vi) (Supp. 1995).

[7] See, *e.g.*, Alaska Rules of Court, Rules of Evid. 504(d)(6) (1995); Cal. Evid. Code § 1017 (West 1995); Conn. Gen. Stat. § 52-146c(c)(1) (Supp. 1995); Del. Code Ann., Unif. R. Evid. 503(d)(2) (1991); Fla. Stat. Ann. § 90.503(4)(b) (West 1979); Haw. Rev. Stat. ch. 33, § 626, Rule 504.1(d)(2) (1988); Idaho Rules of Evid. 503(d)(2) (1995); Ill. Ann. Stat. ch. 740, para. 110/10(a)(4) (1993); Ky. St. Rev., Ky. Rules of Evid. 507(c)(2) (1994); La. Stat. Ann., La. Code of Evidence Rule 510(B)(2)(f) (1995); Me. Rules of Evid. 503(e)(2) (West 1995); Md. Cts. & Jud. Proc. § 9-109(d)(2) (1995); Mass. Gen. L. ch. 233, § 20B(b) (1986); Mich. Comp. Laws Ann. § 330.1750(3)(e) (West 1992); Neb. Rev. Stat. § 27-504(4)(b) (Supp. 1994); 1995 Nev. Stat. Ch. 640, § 19; N.M. Stat. Ann., Rules of Evid., Rule 11-504(D)(2) (1994); N.D. Court Rules Ann., Rule of Evid.

tion for testimony regarding an intent to commit future crimes,[8] parallel to the similar exception to the attorney-client privilege.[9] See *United States* v. *Zolin*, 491 U.S. 554, 562-575 (1989).

503(d)(2) (1994); Okla Stat. tit. 12, § 2503(D)(2) (1993); Or. Rev. Stat. § 40.230 Rule 504(4)(a) (1993); S.D. Codified Laws Ann. § 19-13-10 (1995); Tex. R. Civ. Ev. r. 510(d)(4) (West 1995); Utah Court Rules Ann., Rules of Evid. 506(d)(3) (1995); Vt. Stat. Ann. Rules of Evid. 503(d)(2) (1983); W. Va. Code § 27-3-1(b)(1) and (2) (1992); Wis. Stat. § 905.04(4)(b) (1993); Wyo. Stat. § 33-27-123(a)(vii) (Supp. 1995).

[8] Alaska Rules of Court, Rules of Evid. Rule 504(d)(2) ("crime or fraud") (1995); Cal. Evid. Code § 1018 (West 1995); Conn. Gen. Stat. § 52-146c(b)(3) (Supp. 1995) ("risk of imminent personal injury * * * or risk of imminent injury to * * * property"); Ill. Ann. Stat. ch. 740, para. 110/11(vi) (1993) (specific threats of violence); La. Stat. Ann., La. Code of Evidence Rule 510(B)(2)(e) and 510(c)(2)(b) (1995); Mass. Gen. L. ch. 112, § 129A(2) and (3) (1991) (threat to kill or inflict serious injury or clear and present danger that patient will kill or inflict serious injury); 1995 Nev. Laws Ch. 640, § 19 ("immediate threat that the patient will harm himself or other persons"); R.I. Gen. Laws § 5-37.3-4(4) (Supp. 1994) (where an individual "is in danger from a patient"); S.C. Code Ann. § 19-11-95(C)(3) (Supp. 1994) ("intention * * * to commit a crime or harm himself"); W. Va. Code § 27-3-1(b)(4) (1992) "[t]o protect against a clear and substantial danger of imminent injury"); Wyo. Stat. § 33-27-123(a)(iv) (Supp. 1995) ("immediate threat of physical violence against a readily identifiable victim"). See also *United States* v. *Snelenberger*, 24 F.3d 799, 802 (6th Cir. 1994) (relying in part on state law exception for threats of future crimes to apply similar exception under Rule 501), cert. denied, 115 S. Ct. 433 (1994). Cf. 42 U.S.C. 290dd-2(b)(2)(C) (Supp. V 1993) (confidentiality of treatment records in federal substance abuse programs may be abrogated if there is a "need to avert a substantial risk of death or serious bodily harm").

[9] A number of States simply provide that the psychotherapist-patient privilege shall be placed on the same basis as the attorney-client privilege. See, *e.g.*, Ala. Code § 34-26-2 (1991); Ariz. Rev. Stat. Ann. 32-2085(A) (1992); Ark. Code Ann. § 17-96-105 (Michie 1992); Ga. Code Ann. § 43-39-16 (Michie 1994); Kan. Stat. Ann. § 74-5323 (1992);

Smaller numbers of States recognize a variety of exceptions in other specific categories of cases.[10] A very large number of State statutes and evidence codes, however, fit reasonably well within the model outlined in the previous paragraph. The unanimity among the States on the basic principle that some form of psychotherapist-patient privilege should be recognized, coupled with the substantial uniformity among a large number of States on the major exceptions that are applicable, provides strong support for the argument that "reason and experience" support recognition of a psychotherapist-patient privilege.

2. *Balancing of costs and benefits.* The ultimate question under Rule 501 is whether the proponent of the privilege can establish that the values served by its recognition outweigh the harm that the litigation process will suffer through the unavailability of otherwise

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Mont. Code Ann. § 26-1-807 (1993); N.H. Rev. Stat. Ann. § 330-A:19 (1995); N.J. Rev. Stat. § 45:14B-28 (1995); N.Y. Civ. Prac. L. & R. § 4507 (McKinney 1992); 42 Pa. Cons. Stat. Ann. § 5944 (Supp. 1995); Tenn. Code Ann. § 63-11-213 (1990); Wash. Rev. Code § 18.83.110 (Supp. 1995). Those statutes would thereby appear to incorporate most of the exceptions discussed in text.

[10] A number of States recognize an exception for some or all criminal cases. See, *e.g.*, D.C. Code Ann. § 14-307(b)(1) (1995) ("in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure is required in the interests of public justice"); Ill. Ann. Stat. ch. 740, para. 110/10(a)(9) (1993) (homicide cases); Ind. Code § 25-33-1-17(1) (1995) (homicide trials); Neb. Rev. Stat. § 27-504(4)(e) (controlled substances offenses); R.I. Gen. Laws § 5-37.3-4(4) and (19) (Supp. 1994) (attempting to obtain narcotic drugs from health care provider, medicaid fraud); Tex. R. Crim. E. rules 501-510 (West 1995) (no provision for psychotherapist-patient privilege in criminal cases); Va. Code Ann. § 8.01-400.2 (Michie 1992) (providing for privilege "in any civil action"); Wis. Stat § 905.04(4)(d) (1993) (homicide cases).

probative evidence. In an influential formulation, Dean Wigmore stated that requirement as follows:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (b) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties.
>
> (c) The *relationship* must be one that in the opinion of the community ought to be sedulously *fostered*.
>
> (d) The *injury* that would inure to the relationship by the disclosure must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 J. Wigmore, *Evidence* § 2285, at 527 (McNaughton rev. 1961).

(i). There is little doubt that the first Wigmore criterion is satisfied here: communications made in the course of and in furtherance of psychotherapy "originate in a confidence that they will not be disclosed." Empirical evidence strongly suggests that patients believe that what they tell their psychotherapists will be held in the strictest confidence, and the unanimous adoption by the States of a psychotherapist-patient privilege demonstrates that that belief is reasonable.[11] As the Advisory Committee that drafted Proposed Rule 504 commented:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willing-

[11] See, *e.g.*, Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. of the Amer. Acad. of Psychiatry and the Law 109, 110 (1984) (reviewing prior studies).

> ness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule * * *, there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client.

56 F.R.D. 183, 242 (1972).

(ii). The psychotherapist-patient privilege also satisfies Wigmore's second requirement—that such confidentiality generally is "essential * * * to the full and satisfactory" pursuit of the therapy. Unlike the treatment of physical illnesses and conditions, where chemical or other tests and procedures may be sufficient both to diagnose an illness and treat it, the practice of psychotherapy relies heavily on disclosures of information by the patient for both diagnosis and treatment.[12] Moreover, given the nature of the mental and emotional conditions that psychotherapists treat, "[d]isclosure of communications to psychotherapists * * * would frequently be embarrassing to the point of mortification for the patient." *In re Doe*, 964 F.2d at 1328; see also *In re Zuniga*, 714 F.2d 632, 639-640 (6th Cir.) ("The essential element of the psychotherapist-

[12] As the Sixth Circuit has observed, "[m]any physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him." *In re Zuniga*, 714 F.2d 632, 638 (6th Cir.) (quoting *Taylor* v. *United States*, 222 F.2d 398, 401 (D.C. Cir. 1955)), cert. denied, 464 U.S. 983 (1983); *Lora* v. *Board of Educ.*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977) ("Essential to psychotherapy are confidential personal revelations about matters which the patient is normally reluctant to discuss."); see also *In re Doe*, 964 F.2d 1325 at 1328.

patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure."), cert. denied, 464 U.S. 983 (1983). Finally, a psychotherapeutic patient may often feel less urgency regarding the need to obtain therapy than many patients who are injured or physically ill. Uncertainty about whether disclosures will remain confidential may therefore have a substantive effect on the willingness of individuals to seek psychotherapeutic treatment and to be completely candid in the course of that treatment. *In re Zuniga*, 714 F.2d at 638. The importance of confidentiality to the psychotherapist-patient relationship is comparable to its importance to the priest-penitent or attorney-client relationship, both of which benefit from privileges under Rule 501.

(iii). Petitioner does not dispute that the third Wigmore criterion—whether the psychotherapist-patient relationship is one "that in the opinion of the community ought to be sedulously fostered"—is satisfied. Society has an enormous interest in the relief of mental and emotional distress and illness, and psychotherapy is an accepted means to that end in many situations.

(iv). That leaves the fourth, and most significant, criterion—whether the "injury that would inure to the relationship by the disclosure" is "greater than the benefit thereby gained for the correct disposal of litigation." The uniform view of the States that a psychotherapist-patient privilege merits recognition should carry significant weight in making the judgment that this criterion is satisfied. There are, however, additional considerations that also support this conclusion.

The true costs and benefits of recognizing the privilege become apparent in cases like this one, where a traumatic incident or event imposes mental and emotional stresses on a participant and also may reasonably be expected to

lead to litigation. In that context, the failure to recognize a privilege can exact a heavy cost, because participants may often be discouraged from seeking psychotherapeutic treatment because of the absence of a privilege. In such instances, the failure to recognize the privilege would not materially assist the fact-finding function of the courts, since the very evidence that is sought—the patient's confidential communications to the psychotherapist in furtherance of the therapeutic relationship—would be lost if the confidential relationship is not formed in the first place.

A useful illustration is provided by law enforcement agents, such as Officer Redmond, who become involved in incidents such as the shooting in this case. Agents involved in such incidents frequently experience emotional and psychological stress and turmoil.[13] The difficulties can become severe enough to affect their ability to function effectively, both in their private lives and on the job.[14] Psychotherapeutic treatment and counseling can be helpful to agents in that situation.

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[13] Among the symptoms of posttraumatic stress disorder are reexperiencing of the traumatic incident and intense psychological distress when the individual is exposed to events that recall the traumatic incident; amnesia; feelings of estrangement and detachment; difficulty sleeping and recurrent nightmares; irritability; outbursts of anger; difficulty concentrating or completing tasks; and self-destructive and impulsive behavior. See American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) 424-429. Those symptoms are frequently encountered by law enforcement agents involved in traumatic incidents. See generally Federal Bureau of Investigation, U.S. Dep't of Justice, *Critical Incidents in Policing* (*Critical Incidents*) 85-94, 144-146, 161-162, 251-253, 269-273 (rev. 1991) (describing symptoms in police officers); see also *id.* at 359-362.

[14] Studies from the 1970's showed that up to 95% of the police officers involved in shooting incidents had left police work within five years. See Michael J. McMains, *The Management and Treatment of Post-*

Traumatic incidents may also lead to litigation. Agents involved in such incidents thus often reasonably anticipate being named as defendants in subsequent *Bivens*, Section 1983, or tort actions. If the agents become aware that statements they make to a psychotherapist in the course of treatment would be discoverable in litigation and perhaps admissible in court, they may be dissuaded from seeking such treatment altogether.[15] And if they do obtain such treatment, their statements to their psychotherapists may be sufficiently self-censored to render successful treatment difficult or impossible.

Law enforcement agencies frequently play an important role in referring agents involved in traumatic incidents to counseling. Most of the federal law enforcement agencies, for example, have employee assistance programs through which, *inter alia*, they identify agents who have suffered emotional or psychological difficulties as a result of traumatic incidents and who would be likely to benefit

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shooting Trauma: Administration and Programs, in *Critical Incidents* 191. See also *Critical Incidents* 143 (70% out of law enforcement within five years). The experience of the federal law enforcement agencies is that that number can be dramatically reduced, with appropriate agency support that includes, where appropriate, psychotherapeutic counseling. See *id.* at 191-195; see also Nancy Bohl, *The Effectiveness of Brief Psychological Interventions in Police Officers After Critical Incidents*, in *Critical Incidents* 31-35; James T. Reese, *Justifications for Mandating Critical Incident Aftercare*, in *Critical Incidents* 292-293 (discussing need for mandatory psychotherapeutic intervention after critical incidents).

[15] See Chris Dunning, *Mitigating the Impact of Work Trauma: Administrative Issues Concerning Intervention*, in *Critical Incidents* 77 (discussing need for confidentiality in psychotherapeutic treatment of officers involved in traumatic incidents).

from psychotherapeutic treatment or counseling.[16] Some agencies mandate referral to a psychotherapist after a traumatic incident. If no privilege is recognized, the agencies may feel themselves obligated to inform agents that, although psychotherapy is encouraged or required, disclosures to the therapist will be made at the risk of discovery and evidentiary use in ensuing litigation. Even if agencies do not bring that information to the attention of their agents, a single highly publicized case would be likely to have the same effect. Agents, fearing subsequent litigation, might consequently be unwilling to undertake psychotherapy where indicated or, if they did enter psychotherapy, to communicate with their therapists with sufficient candor to obtain the benefits of the therapy.

Essentially the same calculus would appear to apply in a variety of other situations outside the law enforcement context, in which a particular, traumatic incident results not only in the likelihood of litigation, but also in stresses on the participants that indicate a need for psychotherapeutic treatment. In situations like those, the absence of a privilege would impose a substantial cost on the participants and on society, while making very little new evidence available in subsequent litigation.

C. The Psychotherapist-Patient Privilege Extends To The Facts Of This Case

1. With a single exception, this case presents a core application of the psychotherapist-patient privilege. Respondents seek to discover and to introduce in evidence

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[16] Among the federal law enforcement agencies that have active employee assistance programs that make voluntary or mandatory referrals to psychotherapists are the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Secret Service, the Customs Service, the Bureau of Alcohol, Tobacco, and Firearms, and the Internal Revenue Service.

statements that Officer Redmond made to her psychotherapist in the course of psychotherapeutic treatment. None of the common exceptions to the privilege appear to apply.[17]

Accordingly, as the court of appeals noted, this case does not require the court to "speculate as to what situations would call for the abrogation of this privilege." Pet. App. 22. When such situations do arise, the contours of the privilege and its exceptions should be worked out through relatively clear categorical rules, with a "fail-safe" exception for other extraordinary circumstances justifying abrogation of the privilege. As this Court explained in *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981) with respect to the attorney-client privilege, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." The result of a privilege of uncertain scope would be to "place the policy of protecting open and legitimate disclosure between [psychotherapists] and [patients] at undue risk." *United States* v. *Zolin*, 491 U.S. at 571. The solid basis in reason and experience provided by the States' experience with the privilege and its exceptions can be very useful in developing appropriately clear categorical exceptions and limitations.

2. The single respect in which this case is not a core application of the privilege is that Officer Redmond sought psychotherapeutic treatment from a clinical social worker, not a psychiatrist or psychologist. See Pet. Br. 39-40. The basis of the privilege, however, is society's interest in the availability and benefits of psychotherapeutic treatment, not the particular school of treatment in which the psychotherapist is licensed or otherwise qualified. Some studies have shown that clinical social workers perform a very large percentage of the psychotherapeutic treatment that takes place in this country, and that their work is concentrated in rural areas and among those who are unlikely to be able to afford the services of psychiatrists or psychologists.[18] Limiting the privilege to those licensed as psychologists or psychiatrists would impose an unjustified and unnecessary burden on those least able to afford it.[19]

That does not mean that confidential communications in the course of psychotherapeutic treatment by a clinical social worker—or any other person claiming to administer psychotherapy—would in every instance qualify for the privilege. The privilege should not be applied in contexts in which its rationale fails. The key question is whether the professional was performing genuine psychotherapy at the time of the communication, and whether the communications at issue were reasonably believed by all participants to be confidential.

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[17] Like all other privileges, the psychotherapist-patient privilege would be subject to waiver principles. See *United States* v. *Premises Known As 281 Syosset Woodbury Road*, 1995 WL 737466, at *5 (2d Cir. 1995). In this case, Officer Redmond took steps to protect her privilege. Although she testified concerning the duration and timing of the therapy, see J.A. 100-101, the court of appeals correctly noted "that the psychotherapist/patient privilege protects only *confidential communications*." Pet. App. 21 n.18.

[18] See, *e.g.*, Comment, *The Psychotherapist Privilege: Are Some Patients More Privileged Than Others?*, 10 Pac. L.J. 801, 804 (1979); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050, 1050 (1973).

[19] As argued above, the availability of a privilege may affect individuals' willingness to seek psychotherapy in at least some types of cases. There is a danger that recognition of certain professional categories and not others would serve to give an unjustified competitive advantage to professionals in the favored categories.

In Illinois, social workers are licensed to provide "mental health services for the evaluation, treatment, and prevention of mental and emotional disorders," see Pet. App. 5 n.3, and state law clearly extends the psychotherapist-patient privilege to treatment by clinical social workers, see Pet. App. 21. In those circumstances, Officer Redmond and her clinical social worker reasonably believed that Redmond's communications would be confidential, and there is a basis for recognizing the privilege. In places where state law does not accord that recognition to clinical social workers or render psychotherapeutic communications with a social worker privileged, there would be less basis to conclude that the patient had a reasonable expectation that the patient's confidences would be protected. In a case arising in such a State, there may therefore be no basis to claim a federal court privilege; there would be little reason for a federal court to attempt to protect the confidentiality of a relationship that the State itself has not attempted to protect. Cf. *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

PAUL BENDER
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

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